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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

FRED HOWE,

Defendant and Appellant.

D058805

(Super. Ct. No. SCN279129-2)

In re FRED HOWE on Habeas  
Corpus.

D059902

APPEAL from a judgment of the Superior Court of San Diego County, and petition for writ of habeas corpus, Timothy M. Casserly, Judge. Judgment affirmed; petition denied.

Fred Howe appeals his conviction for possessing counterfeiting apparatus and forgery. He argues the trial court abused its discretion when it: (1) overruled his continuing objection to prior act evidence; (2) did not strike the prior act evidence; and

(3) failed to sua sponte instruct the jury to disregard such evidence. He also asserts that a unanimity instruction should have been given on the count for possessing counterfeiting apparatus, and that the sentence on the forgery conviction should have been stayed pursuant to Penal Code section 654. (Undesignated statutory references are to the Penal Code.) In his petition for writ of habeas corpus, Howe contends his trial counsel provided ineffective representation by failing to ask that the prior act evidence be stricken and the jury instructed to disregard the evidence. We reject Howe's arguments, affirm the judgment and deny his habeas corpus petition.

#### FACTUAL AND PROCEDURAL BACKGROUND

On June 15, 2010, Howe's codefendant, Agatha Breslin, attempted to or did pass counterfeit \$100 bills at four stores located in Valley Center, California. At around 2:00 p.m. that day, Breslin attempted to purchase light bulbs at A-1 Irrigation using a \$100 bill. The employees, however, refused to accept the bill and returned it to Breslin. Breslin then went to Armstrong Feed and attempted to purchase dog food and shampoo using a \$100 bill. An employee told Breslin that the bill was counterfeit and returned it. Next, Breslin successfully purchased a bag of chicken scratch at Terry's Feed with a counterfeit \$100 bill and received about \$92 in change. At about 5:00 p.m. that day, Breslin attempted to purchase light bulbs at Wallace Hardware using a \$100 bill. A deputy sheriff arrested Breslin as she waited at the counter. The deputy found a bill on Breslin, which he believed to be counterfeit.

The following day, deputy sheriffs arrived at Howe's apartment to execute a search under a valid Fourth Amendment waiver. As discussed *post*, Howe and Breslin were

together when Howe previously attempted to pass counterfeit bills. The deputies went inside the apartment and spoke to Howe and another individual, Daniel Pieti, who rented a couch from Howe. The deputies allowed Pieti to leave after a few minutes. The apartment had two bedrooms and was very cluttered. Howe shared the bedroom on the right-hand side with Susan Elaine Crow-Woods, the mother of Howe's son. Howe's son had the other bedroom.

In Howe's bedroom, deputies found a computer with a document depicting a security thread with "USA100" repeated several times. The computer operating system had been loaded on June 2, 2010, and the username found on the computer was "Fred Howe, Jr." The file depicting the security thread had been copied from the Internet to the computer on June 7, 2010 and then printed from a particular type of printer. The computer also contained e-mail correspondence by Howe. When asked about the document, Howe claimed that it had "been there for a long time. That was there before I got arrested last time" and stated that the document was "used for making fraudulent currency." A search of the son's bedroom revealed a counterfeit \$100 bill that had not yet been cut to size (the uncut bill). Howe claimed that the uncut bill had been planted and that he had not made any fraudulent currency since he got out of prison the last time.

The San Diego District Attorney's Office charged Breslin with four counts of forgery related to her acts at the four stores (counts 1-4), and charged Howe with these crimes as an aider and abettor. It also charged Howe with one count each of possessing counterfeiting apparatus (count 5) and forgery (count 6) based on the evidence found

during the search of his apartment. Finally, the information alleged that Howe had seven probation denial prior convictions and two prison prior convictions.

At trial, Special Agent Mark Haaser with the United States Secret Service testified about counterfeiting crimes and counterfeit money. One trend in counterfeiting is to scan a copy of a bill, make alternations to the bill, print the bill on standard copier paper, and then cut it to size. Another trend is to bleach a small denomination bill to remove the ink and then print a larger denomination bill onto the paper, thus retaining the genuine paper.

To deter counterfeiting, Haaser explained that genuine currency has a watermark, a unique serial number and an imbedded security thread. The security thread for a \$100 bill shows the phrase "USA100" followed by an inverted "USA100," with the pattern repeating along the length of the security thread. Because the security thread is embedded in the note, it is very difficult to counterfeit. One method used by counterfeiters to avoid this security measure is to type a security thread on their computer, scan a false bill into the computer, and then scan the counterfeit security thread on top of the bill that they want to print. Another method is to print the front and back side of a counterfeit bill, print a security strip, put the strip between the two sides of the bill, and glue them together.

Haaser analyzed the uncut bill recovered from Howe's apartment and the two counterfeit bills passed by Breslin. He stated that the three bills had a defective security thread because the phrase "USA100" did not follow the inverted pattern. This was the first time he had seen a security thread without inversion. He thought the security threads on the bills matched the image on Howe's computer. Additionally, the \$100 bill

recovered from codefendant Breslin after her arrest and the uncut bill recovered from Howe's apartment had the same serial number.

At the close of the evidence, the trial court granted Howe's motion for a judgment of acquittal on counts 1 to 4 relating to Beslin's acts, finding there was no evidence connecting him to these incidents. A jury convicted Howe of possessing counterfeiting apparatus (count 5) and forgery (count 6). Thereafter, the trial court entered a true finding on Howe's prior conviction allegations. It sentenced Howe to three years for count 5, two years on count 6 to run concurrently with count 5, and one year each for the two prison priors to run consecutively, for a total of five years in prison. Howe timely appealed and filed a petition for writ of habeas corpus. We ordered the writ of habeas corpus consolidated with the appeal.

## DISCUSSION

### I. *Admission of Prior Acts Evidence*

#### A. Background

In 2008, Howe was involved in four separate incidents of possessing or passing counterfeit money; in two of those incidents, he was working with Breslin. Howe moved in limine to exclude this evidence and the prosecution moved to introduce this evidence on the theory it was relevant to show intent, preparation and plan, knowledge, identity and common scheme or plan. The trial court allowed the prosecution to introduce the evidence, concluding that it established a common plan or scheme, i.e., that Howe created the fake bills and that either he or Breslin would pass them. The parties stipulated that

Howe had a continuing objection to the introduction of this evidence. At trial, the prosecution presented evidence of four incidents that occurred in 2008.

On March 9, Howe attempted to pass a counterfeit \$20 bill at Harrah's Casino. Howe then threw away four counterfeit \$100 bills and a \$20 bill. On August 9, Howe purchased an ink cartridge from a Target store with a counterfeit \$100 bill. After passing the bill, he received about \$75 in cash and left the store. On September 15, a U.S. Border Patrol agent pulled over a car occupied by Howe and Breslin. A search of the car uncovered a book containing thirteen \$100 bills, six \$50 bills, and thirteen \$20 bills. The agent determined that the bills were counterfeit because each denomination had the same serial number.

Finally, on October 28, a Riverside County deputy sheriff investigated the passing of two counterfeit \$100 bills at a SuperTarget store. The store security cameras picked up the suspects walking to a particular car after passing the bills. The deputy walked to the car and spoke to Howe who was working on the car's engine. Breslin was inside the car with another female passenger. A search of the car revealed receipts from other stores. After visiting these stores, the deputy recovered 12 counterfeit \$100 bills. Haaser analyzed the \$100 bills recovered from the 2008 incidents involving Harrah's Casino, the SuperTarget store and the Border Patrol agent. All of the bills had the same security thread defect, where the phrase "USA100" had not been inverted throughout the thread.

The trial court instructed the jury that it could consider the prior acts evidence for the limited purpose of deciding whether or not Howe had a plan or scheme to commit the charged offenses.

## B. Analysis

Howe asserts that when the trial court granted his motion for acquittal on counts 1 through 4, it erred by failing to sustain his continuing objection to the prior act evidence.

He claims the prior act evidence had no probative value for counts 5 and 6, or that any probative value of the evidence was now outweighed by its prejudicial effect.

Alternatively, he argues that the trial court had a sua sponte duty to strike the testimony regarding the 2008 incidents and instruct the jury to disregard the evidence. He contends that the court's failure to do so amounted to an abuse of its discretion. Finally, in his petition for writ of habeas corpus, he claims his counsel provided ineffective assistance when he failed to request that the prior act testimony be stricken and the jury instructed to disregard it.

Evidence of other crimes or misconduct is inadmissible when it is offered to show that a defendant had the criminal propensity to commit the charged crime (Evid. Code, § 1101, subd. (a)); however, such evidence is admissible when offered to prove some fact (such as motive, intent, plan) "other than [the defendant's] disposition to commit such [crime or bad act]." (Evid. Code, § 1101, subd. (b).) However, even if the other crimes evidence is relevant to prove one of the facts specified in Evidence Code section 1101, subdivision (b), it must also satisfy the admissibility requirements of Evidence Code section 352. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404 (*Ewoldt*), superseded by statute on other grounds as stated in *People v. Britt* (2002) 104 Cal.App.4th 500, 505.)

Where a defendant challenges the relevance and admission of evidence under Evidence Code sections 352 and 1101, we review the trial court's rulings under the abuse

of discretion standard (*People v. Cole* (2004) 33 Cal.4th 1158, 1195) and its decision will not be disturbed on appeal absent a showing that it exercised its discretion in an arbitrary manner resulting in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

To be admissible to prove a common design or plan, the evidence must "establish that the defendant committed the *act* alleged. Unlike evidence used to prove intent, where the act is conceded or assumed, '[i]n proving design, the act is still undetermined . . . .' [Citation.] For example, in a prosecution for shoplifting in which it was conceded or assumed that the defendant was present at the scene of the alleged theft, evidence that the defendant had committed uncharged acts of shoplifting in a markedly similar manner to the charged offense might be admitted to demonstrate that he or she took the merchandise in the manner alleged by the prosecution." (*Ewoldt, supra*, 7 Cal.4th at p. 394, fn. 2.)

Stated differently, "[t]he presence of a design or plan to do or not to do a given act has probative value to show that the act was in fact done or not done.' [Citation.]" (*Ewoldt, supra*, 7 Cal.4th at p. 393.) "Evidence of a common design or plan, therefore, is not used to prove the defendant's intent or identity but rather to prove that the defendant engaged in the conduct alleged to constitute the charged offense." (*Id.* at p. 394, fn. omitted.)

The degree of similarity needed to prove the existence of a common design or plan is less than that needed to prove identity. (*Ewoldt, supra*, 7 Cal.4th at pp. 402-403.) The evidence need only show "'such a concurrence of common features that the various acts

are naturally to be explained as caused by a general plan of which they are the individual manifestations.' [Citation.]" (*Id.* at pp. 393-394.) "[T]he plan thus revealed need not be distinctive or unusual." (*Id.* at p. 403.) A concurrence of common features, if capable of being naturally explained as caused by a common plan, will suffice. (*People v. Balcom* (1994) 7 Cal.4th 414, 423-424.)

After the trial court's judgment of acquittal on counts 1 through 4, two crimes remained against Howe — forgery for the uncut bill found in his apartment and possessing counterfeiting apparatus for the computer file depicting a security thread for a \$100 bill found on Howe's computer. As we shall discuss, there were common features between the prior crimes and the charged crimes.

In the prior crimes, Howe possessed counterfeit \$100 bills. The \$100 bills recovered from the prior incidents involving Harrah's Casino, the SuperTarget store and the Border Patrol agent had the same security thread defect, where the phrase "USA100" had not been inverted throughout the thread. The security thread file on Howe's computer contained the same defect as the security threads from these prior incidents.

Although Haaser has contact with counterfeit money several times a week and about \$45,000 worth of counterfeit money comes into his field office on a weekly basis, he had never seen this defect before and believed that the image on Howe's computer matched the defective security threads in the counterfeit bills used in the prior crimes. Thus, the prior crimes and the charged crimes are sufficiently similar to demonstrate a common plan, i.e., that Howe made the uncut bill found in his apartment using the file on

his computer. Making counterfeit money is an element of both charged crimes. (§§ 476, 480, subd. (a).)

Having concluded that the evidence of prior crimes had the tendency to prove material facts at issue in the instant case, we next consider "whether the probative value of the evidence of [the prior] offenses is 'substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.'" (*Ewoldt, supra*, 7 Cal.4th at p. 404, quoting Evid. Code, § 352.) The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. (*People v. Padilla* (1995) 11 Cal.4th 891, 925, overruled on other grounds by *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

We conclude the trial court did not abuse its discretion. The trial court admitted the prior acts evidence after hearing extensive argument from counsel. The prior crimes evidence did not consume a great deal of time, the conduct was not remote and it cannot be viewed as more inflammatory than the charged offenses. Any prejudice to Howe was outweighed by the probative value of the evidence. (*People v. Harris* (1998) 60 Cal.App.4th 727, 738-740.) In addition, the trial court properly instructed the jurors to consider the evidence in deciding whether Howe had a plan or scheme to commit the charged offenses. The jury is presumed to have adhered to this admonition. (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1023.)

Because the trial court properly admitted the evidence regarding the prior crimes, we reject Howe's arguments that the trial court had a sua sponte duty to strike the testimony or that his counsel provided ineffective assistance when he failed to request that the testimony be stricken and the jury instructed to disregard it.

## II. *Failure to Give a Unanimity Instruction*

### A. Background

In connection with count 5, alleging possession of counterfeiting apparatus in violation of Penal Code section 480, subdivision (a), the prosecutor argued to the jury that the crime was "super easy" because it had two elements:

"[N]amely, that you're possessing something that you can use to make counterfeit money. And apparatus is - - there's [a] whole bunch of choices on apparatus which is defendant made or had. ¶ In some instances you might have to make something in order to make counterfeit money. For example, you might have to make a security strip. So he made or had an apparatus, paper, either the kind of paper that you need to make counterfeit money, or a machine, a computer, or a computer system. So it's very simply [a] general intent crime that you have this - - some kind of machine or computer system or some paper, some ingredient for making counterfeit money. And that he used it."

The prosecutor then mentioned the uncut bill found in Howe's apartment and the computer file of a security strip and concluded: "So for both having the fake bill which has the paper and having the computer file on your computer, these are both satisfactory for 480." During rebuttal, the prosecutor then contradicted herself, stating that Howe was "charged with 480(a) and 476. ¶ The 480(a) is for the computer." She later told the jurors that "[t]he evidence about the computer file is satisfactory for 480(a) as well as the paper used to make the fake bill."

## B. Analysis

Howe argues that the prosecutor's reference to the "fake bill" and the "computer file" to support count 5 demonstrated why a unanimity instruction should have been given and that the conflict could not have been cleared up by the jury instruction for this crime as the instruction mentions both paper or computer to make counterfeit notes. The Attorney General concedes that the prosecutor made conflicting arguments during closing, but asserts that a unanimity instruction was not required and any error was harmless. We agree with the Attorney General.

When the evidence shows more than one unlawful act that could support a single charged offense, the prosecution must either elect which act to rely upon, or the jurors must be given a unanimity instruction telling them they must agree which act constituted the crime. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534 (*Melhado*)). The unanimity instruction ensures that a defendant will not be convicted when there is no agreement among the jurors as to which single offense was committed. (*Ibid.*) If no election is made, it is presumed that the first offense upon which substantial evidence is introduced is the one selected; however, the jury must be so informed in order for this presumption to operate. (*People v. Gordon* (1985) 165 Cal.App.3d 839, 853, fn. 15, disapproved on other grounds in *People v. Frazer* (1999) 21 Cal.4th 737, 765 and *People v. Lopez* (1998) 19 Cal.4th 282, 292.) The jury may be informed of this election orally. (*People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1454-1455 [prosecutor made election during closing argument].) Where a unanimity instruction is required but not given in a particular case, we review such error under the harmless beyond a reasonable doubt

standard. (*Melhado, supra*, 60 Cal.App.4th at p. 1536; but see *People v. Matute* (2002) 103 Cal.App.4th 1437, 1448-1449 [split of authority in California as to proper standard for failure to give unanimity instruction].)

Here, no unanimity instruction was required because review of the crimes shows there was evidence of only one possible unlawful act for each of the charged offenses. A person will be guilty of forgery if he or she "makes, passes, utters, or publishes, with intent to defraud any other person" a false bill, note or check for the payment of money or property, knowing that the document is false, but intending to pass or use the document as genuine. (§ 476; see also CALCRIM No. 1935.) Thus, by its express terms, this crime can only be committed if an individual possesses a counterfeit bill, note or check. Accordingly, the only evidence that Howe committed forgery is the uncut bill found in his apartment.

To be guilty of possessing counterfeiting apparatus, the People needed to prove that Howe created or possessed "any die, plate, or any apparatus, paper, metal, machine, or other thing whatever, *made use of in counterfeiting*" bank notes or bills. (§ 480, subd. (a), italics added.) Thus, on its face, a person cannot violate section 480 by possessing a counterfeit bill; rather, the person must create or possess some material used in making a counterfeit bill. (*People v. Franz* (2001) 88 Cal.App.4th 1426, 1452-1453; *People v. Clark* (1992) 10 Cal.App.4th 1259, 1264, 1267.) Accordingly, the uncut bill is not relevant to this crime and the only evidence that Howe possessed counterfeiting apparatus is the computer and computer file of the security thread.

Admittedly, the prosecutor misspoke during closing argument when she argued that the "fake bill" and the "computer file" would satisfy section 480. Nonetheless, she twice correctly told the jury that Howe violated section 480 with the computer or computer file and that this crime referred to "some ingredient [used] for making counterfeit money." Howe's counsel also properly argued that the People failed to prove that Howe knew of the uncut bill (referring to the forgery count) or that he used his computer to create counterfeit money (referring to the remaining count). Significantly, the trial court correctly instructed the jury that it could only find Howe guilty of possessing counterfeiting apparatus if he created or possessed "an apparatus, paper, machine, computer, or computer system" and that he used the "apparatus, paper, machine, computer, or computer system" to create counterfeit bills.

Additionally, the trial court instructed the jury with CALCRIM No. 200, requiring it to follow the law as the court instructs and ignore conflicting comments on the law by the attorneys. We presume the jury followed those instructions. (*People v. Boyette* (2002) 29 Cal.4th 381, 436.) Thus, the erroneous comment by the prosecutor was harmless error.

### III. *Section 654*

Again relying on the prosecutor's closing argument (*ante*, Part II.A.), Howe asserts that although he may have been charged with two separate offenses – possession of counterfeiting apparatus (§ 480, subd. (a)) and possession of an uncut bill (§ 476) – the two offenses constituted a single act, preventing the court from imposing double punishment under section 654. Assuming we reject this argument, he alternatively

contends that the uncut bill and computer file were so closely connected as to form one continuous course of conduct, and that he should not have been sentenced to both counts. We reject his first argument (*ante*, Part II.B.) and disagree with his second argument.

Section 654 prohibits the imposition of multiple sentences where a single act or course of conduct pursuant to a single objective violates more than one statute. In such a situation, a defendant may be punished only for the more serious offense. (*People v. Diaz* (1967) 66 Cal.2d 801, 806.) However, if the evidence discloses that a defendant entertained multiple criminal objectives independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were part of an otherwise indivisible course of conduct. (*People v. Centers* (1999) 73 Cal.App.4th 84, 98.) The principal inquiry in each case is whether the defendant's criminal intent and objective were single or multiple. (*People v. Beamon* (1973) 8 Cal.3d 625, 639.) Whether the defendant held multiple criminal objectives is a question of fact for the trial court, and its finding will be upheld on appeal if there is any substantial evidence to support it. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.)

Here, section 654 did not bar punishment for both offenses because each offense required a separate criminal objective. Namely, section 476 prohibited the possession of counterfeit bills for the purpose of fraud and section 480 prohibited creating or possessing materials used to make counterfeit bills. Accordingly, Howe necessarily harbored separate and different criminal objectives, which were independent and not merely

incidental to each other. Therefore, section 654 did not prohibit the multiple punishments imposed in this case.

DISPOSITION

The judgment is affirmed; the petition for writ of habeas corpus is denied.

McINTYRE, J.

WE CONCUR:

NARES, Acting P. J.

McDONALD, J.